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Supreme Court of the United States

OCTOBER, TERM, 1952.

No. 39.

WILLIAM BAUMET,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee,

and

JULIE PETERS, individually and as Executrix under the Last Will and Testament of JOHN J. PETERS, Dec'd,
Defendant-Appellee,

and

HARRIET, JOAN, LIONEL and DWIGHT BAUMET, by Catherine Baumet, their Guardian *ad Litem*,
Defendants-Appellants.

BRIEF OF WILLIAM BAUMET, PLAINTIFF-APPELLANT AND HARRIET, JOAN, LIONEL AND DWIGHT BAUMET, INFANTS, BY CATHERINE BAUMET, THEIR GUARDIAN *AD LITEM*, DEFENDANTS-APPELLANTS.

LOUIS A. D'AGOSTO,
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It is respectfully submitted that the decisions of the Court of Appeals (*Baumet* v. *United States, et al.* 191 F. 2d. 194 and 177 F. 2d. 806) and the decision of the District Court (*Baumet* v. *United States, et al.*, not reported, Clancy U. S. D. J. filed November 3, 1950, S. D. N. Y.) should be reversed and the decision of the District Court (*Baumet* v. *United States, et al.*, 81 Fed. Supp. 1012) should be affirmed with costs in all Courts and that an order should be made directing the Government to make all payments to the appellant, William Baumet, or in the event of his death or legal disability, that all payments be made to the infant appellants, Harriet, Jean, Lionel and Dwight Baumet, by Catherine Baumet, their Guardian *ad Litem*..... 29

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Opinions Below.

There were two opinions rendered by the District Court. John J. Peters, the designated beneficiary, died before the case came to trial. Julie Peters, his widow, moved to be substituted as Executrix. This motion was denied and the cross-claim of John J. Peters dismissed upon the basis

that his claims under the policy were extinguished by his death and that his Executrix had no interest in the policy (*Baumet* v. *United States, et al.*, 81 F. Supp. 1012).

Julie Peters, though not designated in the policy and a stranger to the blood, intervened individually, claiming to be in *loco parentis* and alleging preference over William Baumet, the natural father, and the surviving brothers and sisters of the insured.

She then appealed as Executrix. The Court of Appeals reversed the District Court and held that the right to those installments which accrued from the date of the death of the insured to the date of the death of the beneficiary, John J. Peters, became irrevocable for the beneficiary and should, therefore, pass to his estate (*Baumet* v. *United States,* 177 F. 2d 806).

The United States then intervened and petitioned the Court of Appeals for a rehearing which was denied.

William Baumet then petitioned this Court for a Writ of Certiorari which was denied. The United States filed a memorandum expressing the opinion that the decision of the Court of Appeals was "either erroneous or at least of doubtful soundness" and informed this Court "that the Veterans Administration proposed to adhere to its interpretation of the statute involved, notwithstanding the decision of the Court below" (*Baumet* v. *United States, et al.*, 339 U. S. 923, 973).

Catherine Baumet then intervened in the District Court as Guardian ad Litem of the infants Harriet, Joan, Lionel and Dwight Baumet, brothers and sisters of the insured. On the trial, the District Court dismissed the complaint of William Baumet, the natural father, upon the merits, at the close of the plaintiff's case; dismissed the cross-complaint of Catherine Baumet as Guardian ad Litem of the sisters and brothers of the insured and sustained the cross-

complaint of Julie Peters individually, as to installments accruing after her husband died, even though she was not one of the designated beneficiaries and a stranger to the blood and also sustained her claim as Executrix of her husband's estate as to installments which had accrued up to the date of her husband's death. (Opinion filed November 3rd, 1950, Clancy, J., S. D. N. Y. not reported.)

William Baumet as the natural father and Catherine Baumet as the Guardian ad Litem of the brothers and sisters of the insured, then appealed to the Court of Appeals, which Court affirmed the District Court (*Baumet* v. *United States, et al.*, 191 F. 2d, 194).

The appellants William Baumet and Catherine Baumet then petitioned this Court for a Writ of Certiorari, which was granted May 5th, 1952 (*Baumet* v. *United States, et al.*, 1951 Term, Vol. 96, p. 579).

Jurisdiction.

Writ of Certiorari granted May 5th, 1952. The jurisdiction of this Court rests upon 28 U. S. C. 1254.

Statement.

This action was brought against the United States pursuant to the National Service Life Insurance Act of 1940 as amended, 38 U. S. C. A. 801 *et seq.*, to recover the proceeds of a $10,000.00 policy issued to William Baumet, Jr., who died in military service October 26th, 1942. William Baumet, Sr., the appellant, is the insured serviceman's father. A cross-claim was filed in the action by John J. Peters, a maternal uncle who was designated as beneficiary. He died June 28th, 1948 before the action came to trial. The United States admitted liability. His widow, Julie Peters,

then intervened as Executrix, claiming the installments which matured before his death. She also claimed individually and in loco parentis to the insured, installments maturing after her husband's death.

Harriet, Joan, Lionel and Dwight Baumet, infant half-brothers and sisters of the deceased serviceman also intervened by their Guardian ad Litem, claiming that if William Baumet, the natural father, did not qualify in the contract of insurance within the meaning of the National Service Life Insurance Act of 1940, 54 Stat. 1008, c. 757, Title VI, Part I, Sec's 601, *et seq.*, 38 U. S. C. A. 801 *et seq.*,

> "Sec. 602 * * * (g) The insurance shall be payable only to a widow, widower, child (including a stepchild or an illegitimate child if designated as beneficiary by the insured), parent (including person in loco parentis if designated as beneficiary by the insured), brother or sister of the insured. The insured shall have the right to designate the beneficiary or beneficiaries of the insurance, but only within the classes herein provided, and shall, subject to regulations, at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries but only within the classes herein provided."

that they then take as brothers and sisters of the deceased serviceman to the exclusion of John J. Peters, who died six months before his complaint was dismissed (*Baumet* v. *United States, et al.*, 81 F. Supp. 1012) and almost two and one-half years before the trial and also to the exclusion of Julie Peters, who is a stranger to the blood, was not designated beneficiary and is expressly barred from taking pursuant to subdivision:

> "(i) If no beneficiary is designated by the insured or if the designated beneficiary does not survive the insured, the beneficiary shall be determined

in accordance with the order specified in subsection (H) (3) of this Section * * *."

Note the use of the word "only" in subdivision (g) *supra*.

William Baumet, Jr., the service man, enlisted in the U. S. Naval Reserve in Chicago, Illinois, June 25, 1941, at which time he was 21 years old and listed his home in their records as 619 Langdon Street, Madison, Wisconsin (R. 327, D's, Ex. NN) Thereafter, he recevied a $10,000.00 insurance contract from the National Service Life Insurance as an aviation cadet, effective October 3, 1941 (R. 106). He named therein as his beneficiary, a maternal uncle, designating him as follows: John J. Peters, "adopted father" (R. 106). It is undisputed that the serviceman was never adopted by anyone. It is further undisputed that the insured did not name any contingent beneficiary (R. XV).

On November 13, 1941, forty days after the insured obtained his policy, he changed his address on the official Navy records to read 408 Rugby Road, c/o John J. Peters, Brooklyn, N. Y. (R. 107). He was appointed 2nd Lt. in the U. S. Marine Corps and died in an airplane crash October 26, 1942.

Thereafter, John J. Peters filed a claim with the Veterans Administration for insurance benefits contending the relationship of loco parentis to the insured.

William Baumet, Sr., the natural father of the insured and appellant herein, also filed a claim contending that he never relinquished custody or control over his son; that he had supported him until he was 19 years of age and would have continued to do so thereafter had he known of his whereabouts and that he never abandoned him (R. Veterans' Admin. file). The appellant made numerous efforts to ascertain the whereabouts of his son from the time that

he was 19 years old to the date of his death but the same were fruitless (R. 31-39). It is evident that his whereabouts was concealed from his natural father. The only claims reviewed by the Veterans Administration were those of the natural father, the appellant herein, and the now deceased maternal uncle, John J. Peters (R. 2, Veteran's Admin. file).

The three adjudicators of the Veterans Administration found, after a thorough investigation lasting more than one and a half years, that William Baumet, Sr., the appellant herein and natural father of the insured, was entitled to the proceeds on the basis that he was the natural father, that he had never relinquished control or custody over his son; that he had never abandoned him (Veterans' Admin. file); that John J. Peters, the maternal uncle, now deceased, was not in loco parentis and therefore not entitled to any of the proceeds (Veterans' Admin. file).

On May 2, 1944, the Administrator overruled the three adjudicators, even though he found that:

> "There are on file copies of numerous letters from the insured to his father, written during his boyhood and while he was at college through 1938; of excerpts from the boy's diary and while he was a member of his father's household following his mother's death; and of receipts of money. This evidence shows that the relations between the boy and his father were very cordial and that the father made substantial contributions to his son's support and kept in touch with him following the separation of the parents".

He further found:

> "The father asked the insured to come home but refused to consent to his return to the University of Wisconsin".

(Dec. of Administrator Breining. Dated May 2, 1944).

At the close of the appellee Julie Peters' case, her attorneys conceded that the evidence submitted by them did not support their claim that either John J. or Julie Peters was in loco parentis prior to November, 1938 at which time the insured was 19 years old (R. 326-7).

On June 2nd, 1936, after the insured's mother died, he lived with his father, the appellant herein, who had remarried and with his then born half-sisters, Harriet and Joan, two of the infant appellants herein. He occupied his own room for 15 months in a 4 room apartment occupied by the appellant, his stepmother and infant sisters. The insured then left to attend the University of Wisconsin (R. 102). The appellant, being a person of limited financial means, was compelled to use in addition to his personal funds, about $900.00 out of a balance of $1,250.00 then remaining in the account of the insured towards his education (R. 28-31).

These withdrawals were made by the father and son jointly with the approval of the Surrogate.

On November 15th, 1938, the insured abandoned college without his father's consent or knowledge and turned up in Jacksonville, Florida, in December of 1938 (R. 31, Plaintiff's Exhibit 11).

Before the insured left college without his father's knowledge, he arranged with a classmate, Silk, to write his father letters pretending to come from him. The father, being under the impression that the insured was still in college, sent him such sums as he could. These were received by Silk and transmitted to the insured. Silk would write letters to the father simulating the insured's language and signing himself, as son, "Bill" (R. 362-8).

Silk explained the deception as follows:

> "He had been in rather bad health from the time he came back. He had been in an automobile acci-

dent driving to Wisconsin from New York. And he was not doing well in his studies in that semester. He was also rather disconsolate over a girl that he was going with and who transferred her affections. His wrestling was off. All the things that worry a sophomore. And there was a kind of literary despair and a romantic determination to see life and various things of that kind. He decided in November to leave the University" (R. 404).

The insured returned to New York in December of 1938. The first inkling that the appellant had of his son's leaving college was when he received a letter addressed, "William Baumet" from the University advising the son that in view of his severance from college, he could continue his studies by correspondence (R. 31, Plaintiff's Exhibits 9 for Identification and 10).

The insured returned to New York the last week of December, 1938, and obtained work at Dard's, Inc. and the Flatbush Auto Discount Corp. in New York City (R. 309-310).

In January of 1939, the insured and his uncle, John J. Peters, visited the appellant at his place of employment and Peters demanded that the appellant return the insured to the University of Wisconsin. The appellant refused this request, stating that he wanted his boy home where he could exercise parental control and requested that his son matriculate at a college nearby in view of the boy's previous escapades (R. 32-3). The appellant's refusal to permit his son to return to the University of Wisconsin embittered him (R. 33, Exhibit 9 for identification).

He then communicated with an uncle, Robert Peters, who refused to become involved (R. 258).

The insured then charged the appellant with mismanagement of guardianship funds. The Surrogate of New York County appointed the late Warren C. Fielding to

inquire into this complaint and after a thorough investigation found no evidence of mismanagement and further found that the appellant wanted the boy back home (Plaintiff's Exhibit 9 for identification). Notwithstanding a stipulation by counsel that this report be admitted in evidence, the District Court excluded it (R. 164, 368-9). The appellant, being deeply grieved by his son's conduct, requested that he be relieved as Guardian of the property of his son and that the balance of $341.00, then remaining in the fund, be administered by someone else (R. 166, 169).

Finally, in May of 1939, John J. Peters, now deceased, was appointed Guardian of the boy's property, jointly with the Clerk of the Surrogate's Court. In the Petition, the boy gave his address as 1086 2nd Avenue, New York City. It is to be noted that this, as late as May, 1939, was not the address of John J. Peters, the designated beneficiary, who at all times, resided in Brooklyn, N. Y. (R. 168).

In May, 1939, the insured severed his employment with Flatbush Auto Discount Corp. and returned to Wisconsin. He stopped off at Madison and arranged for reentry to the University in the fall of 1939 (R. 106, Stip.). In June of 1939, he obtained employment at the Lakeside Laboratories in Milwaukee, Wisconsin, where he worked until September of 1939 and then went back to the University (R. 313).

At the insured's request, John J. Peters, withdrew $150.00 from the insured's trust fund so that the insured could enter the University. The balance of the insured's trust fund was to be withdrawn at the rate of $25.00 per month (R. 302-3). While at the University, the insured worked part-time at the Barg & Foster Candy Co. of Madison, Wis. from October, 1939 to January, 1940 to supplement his withdrawals from his trust fund (R. 313). In January, 1940, the insured again severed his connection with the University (R. 55-9, Plaintiff's Exhibit 11).

He then returned to New York and worked for the Carr-Lowery Glass Co. at 500 5th Avenue, New York City listing as his home, 110 E. 87th Street, New York City.

He worked there from March 11, 1940 to June 29, 1940. (R. 315-319, Plaintiff's Exhibit 20). It is to be noted that this address was not the address of the Peters family.

He then returned to Wisconsin and obtained employment with the Quartermaster Dept., Wisconsin National Guard, Camp Douglas, Wis., as a civilian, where he worked during the summer months (R. 59, Stipulated).

He was again admitted to the University of Wisconsin, this time on an athletic scholarship, without tuition and again obtained employment with the Barg & Foster Candy Co., in Madison, Wisconsin, to supplement $15.00 per month that he was receiving from his own trust fund and other sums from an uncle, Milton Loeb. He worked for this company from June, 1940 to June, 1941, giving his address as 4206 Yuma Drive, Madison, Wis. (R. 314).

He also earned additional sums at college, as described by his college chums, Silk and Viskocil (R. 115, 354, Plaintiff's Exhibit 22, pp. 16, 17, Defendant's Exhibit O).

In June, 1941, he left college for the third and last time, stating in his own handwriting in a letter to his maternal uncle, John J. Peters:

> "I have had pretty tough sledding since Milton stopped sending me money • • •. I borrowed dough all around here from some of the fellows and I made a miserable mess of school this semester • • •. But that is all behind me and I am going to forget it. I am in the Navy now" (R. 173).

It is to be noted that this letter was never answered by either John J. or Julie Peters and that the Milton referred to in the letter is one, Uncle Milton Loeb.

The last time that the insured left College, he owed the University Loan Fund about $50.00 for loans made during the school year 1940-1941, which loans still remain unpaid (R. 436), although Julie Peters, the appellee, testified that she had paid the same (R. 221).

Assignment of Errors.

1. The District Court erred when it directed payment of accrued installments to the Estate of John J. Peters.

2. The District Court erred when it directed payment of installments which had accrued after the death of John J. Peters to his widow, Julie Peters, individually, a stranger to the blood who was never designated beneficiary and was never intended as such by the insured.

3. The District Court erred when it excluded letters from the insured and from the insured's mother to the natural father, although they had been stipulated by counsel to be admissible in evidence. The District Court also erred when it excluded the insured's diary. This evidence was material to the issue of loco parentis.

4. The District Court erred when it dismissed the plaintiff's complaint at the close of his affirmative case and thereby deprived him of his constitutional right to a trial of the issues of fact.

5. Insofar as the appellants, Harriet, Joan, Lionel and Dwight Baumet were concerned, the District Court erred when it disregarded Section 347 of the Civil Practice Act of New York and admitted evidence concerning personal transactions or communications between the decedent and the appellee, Julie Peters, an interested person.

6. The Court of Appeals erred when it reversed the Court below (*Baumet* v. *United States*, 81 Fed. Supp. 1012)

and again when it affirmed the trial Court below. (Clancy, J., opinion filed November 3, 1950, not reported).

7. The Court of Appeals erred when it found that the rights of the infant brothers and sisters of the insured were contingent upon the rights of the natural father, notwithstanding the erroneous concession of counsel for the infants in that Court.

ARGUMENT.

I.

Payment of accrued installments to the estate of John J. Peters, deceased, designated beneficiary, are prohibited by the National Service Life Insurance Act of 1940, subdivisions (i) and (j).

"(i) If no beneficiary is designated by the insured or if the designated beneficiary does not survive the insured, the beneficiary shall be determined in accordance with the order specified in subsection (h) (3) of this section and the insurance shall be payable in equal monthly installments in accordanee with subsection (h) (1) or (2), as the case may be. The right of any beneficiary to payment of any installments shall be conditioned upon his or her being alive to receive such payments. No person shall have a vested right to any installment or installments of any such insurance and any installments not paid to a beneficiary during such beneficiary's lifetime shall be paid to the beneficiary or beneficiaries within the permitted class next entitled to priority, as provided in subsection (h).

"(j) No installments of such insurance shall be paid to the heirs or legal representatives as such of the insured or of any beneficiary, and in the event

> that no person within the permitted class survives to receive the insurance or any part thereof no payment of the unpaid installments shall be made" (38 U. S. C. A. 802(g)(j).

It is respectfully submitted that the foregoing are the three conditions imposed by Congress before payment of any installments could be made to a beneficiary.

1. That he be "alive to receive such payments".

2. That "no person shall have a vested right to any installments."

3. That "No installments of such insurance shall be paid to the heirs or legal representatives as such of the insured or of any beneficiary."

It is respectfully submitted that no installment is due and payable to anyone in the case at bar until this Honorable Court, the Court of last resort, has spoken.

Section 3 of the Servicemen's Indemnity and Insurance Acts of 1951, Chapter 39, Public Law 23, 82nd Congress, although enacted to cover cases arising out of the Korean conflict, reasserts the intention of Congress that no payment shall be made to the Estate of any deceased person and that in the event of any disability of any beneficiary or contingent beneficiary to take, then the beneficiary or beneficiaries next entitled to priority under the Act shall take.

"Sec. 3 • • •

> Any installments of an indemnity not paid to a beneficiary during such beneficiary's lifetime shall be paid to the named contingent beneficiary, if any; otherwise to the beneficiary or beneficiaries next entitled to priority; Provided that no payment shall be made to the estate of any deceased person."

The foregoing Section seems to apply to the case at bar.

Assuming without conceding that the proof establishes that John J. Peters was in loco parentis, the fact remains that he was not alive to take and that the installments were not payable to his Estate and therefore the rights of the natural parent, the appellant, William Baumet, Sr., were reinstated under the cases of *Strunk* v. *United States* (80 Fed. Supp. 432), and *Mansfield* v. *Hester* (81 Fed. Supp. 737). As to *Julie Peters*, the argument applies with even greater weight because she was never designated.

In any event, the next entitled to priority under the Act, would be the brothers and sisters of William Baumet, Jr., not Julie Peters, the appellee herein.

The following language in *Strunk* and *Mansfield*, *supra*, is significant:

Strunk v. *United States*, 80 Fed. Supp. 432, page 435:

> "The assumed parental relationship of the grandfather affected the natural relationship of the plaintiff only during the life of the grandfather. Upon his death, all rights of the plaintiff, the only living parent of the insured were revived."

Mansfield v. *Hester*, 81 Fed. Supp. 772, page 776:

> "* * * Even if we assume that the rights of the plaintiff as a natural parent were for a time superseded by those of the grandmother, standing in loco parentis to her grandson, yet at the grandmother's death, plaintiff's rights were revived. She being the only living parent, and never having relinquished her parental rights or obligations, she is entitled to claim the insurance benefits."

Note *Washburn* v. *United States*, 63 Fed. Supp. 224 construing the subdivisions of the Act involved at bar, page 228:

"As no benefits were paid to such 'principal' beneficiary during her lifetime, the entire amount thereof was, under subsection (i) payable in accordance with the provisions of subsection (h)."

See also *Bearhart* v. *United States*, 82 Fed. Supp. 652 at page 655:

"Section 802 (j) precludes payment 'to the heirs or legal representatives'. Only survivors within the 'permitted class' may be named as beneficiaries."

Matter of *Kohn* v. *Bates*, 275 A. D. 431, aff'd. 300 N. Y. 722, although constructing Chapter 574 of Laws of 1947 concerning veterans' bonus payable by the State of New York is interesting and persuasive.

275 A. D. 431 at page 434:

"The case appears to be directly in point to the extent at least that it establishes that a bonus is a mere expectancy revocable at the will of the Legislature and does not constitute property in the sense that it would pass to the executor as an asset of the original claimant's estate. (See Harlan *v.* Archer, 79 F. 2d, 673, 677, certiorari denied 296 U. S. 656) for a general discussion of the question involved."

Again at page 435:

"The language of the statute leads to the conclusion that the persons eligible to the bonus, whether veteran or next of kin, must be alive in order to be entitled to its payment and that neither the estate of the veteran nor of the next of kin, regardless of whether an application for the bonus has been made, is entitled to payment of the same in the event that such applicant dies prior to payment."

Note the language in the New York Court of Appeals, 300 N. Y. 722:

> "* * * that the next of kin mentioned in the statute must be alive in order to receive payment of the bonus, and that the Estate of such next of kin who dies before receiving payment has no right thereto, * * *."

II.

Payment of any installment to a person not designated in the policy and a stranger to the blood is forbidden by the Act, subdivision (g), *supra*.

It is respectfully submitted that the use of the word "only" by Congress in Section 602, (g) *supra*, is controlling in the contract of insurance at bar. By the terms of the foregoing subdivision, Julie Peters, the undesignated stranger, is clearly barred.

III.

Julie Peters, an undesignated stranger, and John J. Peters, now deceased, are not persons entitled to take within the meaning of the Act.

It is respectfully submitted that the Courts below overlooked the following material evidence, which indicated that the insured was continually employed and self-supporting after he left his father's home to the time that he entered the service. Letters from his employers, letters from the Dean of the University of Wisconsin and the testimony of Julie Peters on cross-examination substantiate these facts. It is undisputed that he worked at the following places:

Dard's, Inc., 341 Madison Ave. N. Y. C.	$ 6.20	Dec. 1938 (R. 308)
Flatbush Auto Disc. Corp., 1327 Flatbush Ave. B'klyn.	199.10	Jan.-May, 1939 (R. 309)
The Lakeside Labs. Inc., 2344 N. Oakland, Milwaukee, Wisc.	213.45	June, 1939 Sept., 1939 (R. 313)
Barg & Foster Candy Co., 200 S. 2nd St., Milwaukee, Wisc.	49.75	Oct.-Dec. 1939, Jan. 1940 (R. 313)
Carr-Lowrey Glass Co., 500 Fifth Ave. N. Y. C.	195.00	Mar.-June, 1940 (R. 315) (R. 319)
Barg & Foster Candy Co., 200 S. 2nd St., Milwaukee, Wisc.	138.00	Oct. 1940, May 1941 (R. 313)
Civilian employment at Quartermaster's Depot at Camp Douglas, Wisconsin (Stipulated by Counsel)		(Earnings unknown) Summer, 1940.
Other earnings in depositions of Leonard Silk and E. Viskocil in evidence.		(R. 115, 354)

The entire balance of trust fund amounting to $341 withdrawn by Peters.....		(R. 304) (R. 312)
No tuition fees required at University of Wisconsin for year 1940-1941, amount waived (Stipulation in evidence).....	200.00	
Loans contracted at the University in 1941 during alleged period of "in loco parentis"	75.00	(R. 436)

An examination of Julie Peters' claims reveals a story which is a figment of the mind conceived to meet the exigencies of the situation. It was apparently manufactured to divert all of the proceeds of the $10,000.00 insurance policy from members of the immediate family of the insured to herself, an opportunity she considered well worth the effort. However, the web of her story, built upon an uneasy structure arising out of an alleged residence by the insured with her for only a short period of four or five months during which he was employed, disintegrates because of the glaring contradictions and inconsistencies flowing out of her own mouth.

The following excerpt from a letter written by the insured to John J. Peters introduced by the appellee herself is enlightening indeed on the issue of loco parentis and the manner in which the Peters family allegedly supported him:

> "I have had pretty tough sledding since Milton stopped sending me money. * * *. I borrowed dough all around here from some of the fellows and I made a miserable mess of school this semester. * * * But

that is all behind me and I am going to forget it. I am in the Navy now" (R. 173).

It is undisputed that the "Milton" mentioned in this letter is neither John J. nor Julie Peters.

Here is another classic example of Julie Peters' evidence on the issue of loco parentis:

> "Q. As you sit there now do you have a single letter that was ever addressed to you personally by William Baumet, Jr.? A. There were hundreds of them but I tore them up" (R. 173).

It is beyond belief that a person would tear up each and every letter received from a so called endeared one in active service in time of war, as soon as it was read.

The story Julie Peters tells of selling her furs to buy clothes for the insured (R. 214), and under cross-examination that her son Lester living with her was worth $100,000 (R. 314) and that her husband averaged $100 a week (R. 301), and the tale of taking in sewing to help the boy while admitting he was employed (R. 215-217) and of sending him $2.00 in each letter she sent him, although he was an officer in the Navy, does not ring true.

Note the glaring contradiction from Julie Peters own mouth:

She testified that the insured, a boy 19 years old, lived with her for about four or five months and of his then running away and living in a furnished room at 1086 Second Avenue, Borough of Manhattan, a few doors away from an aunt, Betty Loeb, and after finding him she brought him back to Brooklyn, and after staying there a few days, the insured again left to go to work in Wisconsin (R. 222, 284-7, 297).

In those few days, the insured filed a petition in the New York County Surrogate's Court, again stating his address as 1086 Second Avenue, Manhattan (R. 168, 284-7, 293, 6, Defendant's Exhibit Q).

When he went to Milwaukee a few days later, he gave his address as 1041 East Ogden Avenue, Milwaukee.

Under these circumstances, can it fairly be said that the boy considered Julie Peters as his "mother"?

Julie Peters placed three so-called "endearing" cards, written by her and John J. Peters to the insured, in the dead boy's box after the box was returned by the Navy (R. 235-7) and repudiated this testimony the following day after she realized that the contents of the tin box were a matter of official record (R. 269-271).

This was indeed a brazen and clumsy attempt by her to build up a claim of loco parentis.

Her claim of daily allowances to the boy out of her funds, though supposedly in want herself, with the boy employed continuously in over six jobs during the alleged period of in loco parentis is preposterous (R. 309, 313, 319, 469).

Julie Peters' testimony shows that Peters withdrew every cent of the $341.00 balance of the boy's trust fund for the boy, a matter which was not clear to the Appeals Court in its Opinion (R. 312).

The award to Julie Peters cannot be justified on the basis that it was made to carry out the intention of the insured. She neither pleaded nor proved nor ever contended such an intention nor was it so found in the Courts below. He did not designate her as a beneficiary. There is not a single letter or scrap of writing in existence (R. 277-8) or oral evidence that he intended Julie Peters to share in the proceeds. He made no allotment to her (R. 331). He never

addressed her in any terms that would signify that he considered her "a mother". He never made a gift to her or sent her a memento of any kind. He did not mention her in his holographic Will in which he left his assets to his college chums (R. 111), and there is not a single receipt or acknowledgement of moneys that she alleges she and John J. Peters sent him even when he was a commissioned officer and while she was allegedly in "want" (R. 323).

The insured never referred to John J. Peters as his "father". He always addressed him either as "Jack" or "Uncle Jack" (R. 232, 235). In one letter he stated "you have been a good friend and a good uncle" (R. 234). In another (Defendant's Exhibit T, R. 174) the insured wrote him requesting a $5.00 loan and addressing him as Uncle Jack.

The appellee introduced only one letter from the insured to his uncle Jack prior to the insured's entry into the service (Defendant's Exhibit R, R. 169).

Strange indeed how the so-called father, John J. Peters, was able to produce only one letter written to him by the insured prior to entry into service and Julie Peters not able to produce any, either prior or subsequent to the insured's entry into service.

If the rights of the father, brothers and sisters of the insured are to be wiped out and the family relationship destroyed by an undesignated stranger, then it should be done by clear and convincing evidence of the highest probity and indisputable integrity.

The appellants respectfully submit that Julie Peters was not such a person as to free her from the implications that her claim was conceived in bad faith.

Her testimony on cross-examination indicated that she was not the legal aunt of the insured under New York Law.

While there is no desire on the part of the appellants to question the legality of her marriage to Peters, it becomes necessary in the instant case on the issue of her credibility and legal status (R. 264-9), (Plaintiff's Exhibit 17, Marriage License). Her marriage to Peters was based upon false representations sworn to by her that her first husband was "dead" when as a matter of fact he was still alive at the time of this trial (R. 265). Her first husband had secured a divorce in Supreme Court, Kings County.

It is evident that the motive behind her false sworn statement was to avoid a legal impediment forbidding her to remarry in New York State.

See *D'Arcangelo* v. *D'Arcangelo*, 277 A. D. 644, 102 N. Y. S. 2d, 100, which holds that

> if a woman forbidden by New York divorce decree to remarry until death of former husband remarries before death of husband without permission of the Court, the marriage would be void and the woman guilty of bigamy.

It is also to be noted that Peters himself on the same marriage application swore falsely that this was his "first" marriage when as a matter of fact, he too had been previously married and divorced (R. 294-5).

There was no diversity of opinion prior to the instant case as to an undesignated person claiming "in loco parentis" to the exclusion of the surviving members of a serviceman's immediate family.

The Courts have been emphatic in the rejection of such claims even where the evidence tends to support a relationship of "loco parentis" and a designation.

The Courts have taken cognizance of the possibility of bad faith and extensive litigation in the presentation of such claims.

See *Mansfield* v. *Hester*, 81 Fed. Supp. 772:

> "It must be remembered that Lillie Hester claims the proceeds of this insurance, not as a designated beneficiary, but under the distribution provisions of the statute; and therefore the reasons which many Courts have given for construing the term 'in loco parentis' liberally in order to carry out the wishes of the insured are not applicable here" (p. 775).
>
> "Even if we assume that the rights of the plaintiff as a natural parent were for a time superseded by those of the grandmother standing in loco parentis to her grandson, yet at the grandmother's death, plaintiff's rights were revived. She being the only living parent, and never having relinquished her parental rights or obligations, she is entitled to claim the insurance benefits" (p. 776).

Bourbeau v. *United States*, 76 Fed. Supp. 778;
Bearhart v. *United States*, 82 Fed. Supp. 652.

As to a person designated "in loco parentis" and not of family kin, the leading authorities supporting the theory of strict and technical construction of such a designation, and which have rejected such claims as not meeting the standard proof required to displace the immediate family kin, are:

Amer. Natl. Bank v. *U. S.*, 134 F. 2d, 674;
Mansfield v. *Hester, et al.*, 81 F. Supp. 772;
Strunk v. *United States*, 80 F. Supp. 432;
Neuhard v. *United States*, 83 F. Supp. 911;
Richards v. *United States*, 93 F. Supp. 208.

Niewandomski v. *United States*, 159 Fed. 2d 683:

> "Her purpose was to aid and assist rather than to assume any parental obligations or exercise such parental control as continues to exist in the case of

an adult child continuing to live in the parent's home" (p. 686).

"His self support and independence of action are also important factors" (p. 686).

"* * * Kindness and generosity, even on the part of near relatives, are not the same as assuming the common law relationship of in loco parentis" (p. 686).

United States v. *Mac Master*, 174 F. 2d, 257:

"The fact that Congress selected to express its intention a Latin phrase which has a definite meaning in law strongly suggests that it was used in a technical sense. That sense is defined in Black's Law Dictionary: 'In the place of a parent; charged factitiously with a parent's rights, duties and responsibilities'. 42 C. J. S. In page 489, adds: 'More specifically, the relationship which a person assumes toward a child not his own, holding the child out to the world as a member of his family toward whom he owes the discharge of parental duties';" (p. 259).

Strauss v. *United States*, 160 F. 2d, 1017:

"The only issue is whether the Court below correctly concluded that the defendant did not stand in loco parentis to the insured. It is clear that the insured thought she did, and that he wished her to receive the proceeds of the policy, but this is not decisive of the question" * * * (p. 1018).

"Without a doubt there was a strong bond of affection between the defendant and insured, but that is not sufficient to establish the fact that she stood in loco parentis" * * * (p. 1018).

"Foremost among these obligations is the responsibility for the support of the child" * * * (p. 1018).

"However, the parent of a minor generally is responsible for the support of the child and we believe that such responsibility is necessary to establish the relationship of one in loco parentis" (p. 1019).

In the foregoing cases the kindness and favors bestowed upon the insured during his lifetime by those claiming in *loco parentis* and designated were far more substantial and convincing than those of John J. Peters, now deceased, or Julie Peters, the undesignated stranger and still they were rejected by the Courts.

The *Bearhart* case, *supra*, is also significant:

"In my opinion, the claim of the co-defendant must fail because she has not carried her burden of proof. Further, as between a natural mother and one claiming to have stood in loco parentis, it will be presumed that the natural mother last bore the relationship of parent. Weighing the facts in this bitterly contested case, the exclusion of the co-defendant from designation as a beneficiary by the insured tips the scales in favor of plaintiff" (p. 656).

IV.

The dismissal of the plaintiff's complaint at the close of his affirmative case was a departure from the accepted and usual course of judicial proceedings.

The concluding remark of the District Court in its Opinion is a sad commentary of the father's plight in his efforts to be fairly adjudged against accusations that he was not a good father.

"Although the Court dismissed the plaintiff's complaint at the close of the plaintiff's case, this

decision has been arrived at on the entire case" (R. 422).

The reading of the whole Opinion with its indictment of the father to justify the decision, based almost entirely on testimony freely offered by Julie Peters during the enforced "absence" of the father as a party to the action from further participation in the trial after the dismissal of his complaint must indeed raise the question whether the findings of Fact and Conclusions of Law based thereon were correct and whether the father was thereby deprived of his substantial rights.

See *Strunk* v. *United States, supra:*

> "Parental relationship when once established is presumed to continue and one who avers its discontinuance has the burden of proving it. * * *". * * * "In every case the showing of such relationship, in the absence of anything more, makes out a prima facie case for the parents, which can be overcome only by the most solid and substantial reasons, established by plain and certain proofs. The burden of proof is not on the parent but on the opposing party, even where the latter has the actual custody of the child" (p. 435).

See also *Mansfield* and *Bearhart, supra.*

The plaintiff came to court clothed with the undisputed fact, conceded in the pleadings that he was the only natural surviving parent. As such he was entitled to the presumption and benefit of that status until proof to the contrary was adduced and as such entitled to be a party to any and all proceedings in a challenge to his status as a parent. But he was figuratively thrown out of Court at the end of his affirmative case (R. 76).

The Trial Court erred when it excluded letters from the boy to the father indicating support, maintenance, retention of control over the boy, parental guidance and bonds of affection while the boy was living with his mother. The Court erred when it excluded letters from the boy's mother to her former husband, the appellant herein, indicating receipt of moneys from the appellant and the existence of a cordial relationship even though all of these letters were stipulated by counsel (R. 20).

The Court erred when it excluded the boy's diary which was written by the boy while he lived with the appellant after his mother died. This diary showed exchange of gifts, educational guidance and progress, love and affection among father and son, and half-sisters and brothers, parental control, all matters vital to plaintiff's case. Nowhere in this diary did the insured refer to either John J. or Julie Peters over a period of 15 months (R. 63, Plaintiff's Exhibit 13 for Identification).

The Trial Court erred when it excluded, despite stipulation of counsel, the report of Warren C. Fielding, Esq., special guardian, dated February 16, 1939, appointed by the Surrogate's Court indicating that the father appealed to the son to return home after he left at 19 years of age (R. 49, 164).

There does not appear to be a single recorded instance that can be cited to sustain such a ruling with its resulting prejudices. His case was foreclosed and he was deprived of the fundamental right to defend his honor and status as a father against attack and to rebut the claim of an uncle, then deceased, and an undesignated stranger.

It being conceded that Baumet Sr. was the natural father of Baumet Jr. and as such entitled to the presumption that once a father always a father, then it is submitted

that the plaintiff had made out a prima facie case in the District Court and as such was entitled to a full and fair trial on all of the issues of fact involved.

V.

The rights of the infant brothers and sisters of the insured are absolute under the National Service Life Insurance Act. They take to the exclusion of John J. Peters, now deceased and to the exclusion of Julie Peters, the undesignated stranger, in the event of the death or legal disability of the Natural Father.

The infants were deprived of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States when the trial Court admitted evidence over objection of counsel and disregarded the provisions of Section 347 of the New York Civil Practice Act (R. 210).

Julie Peters' testimony relating to conversations, communications and transactions had with the deceased in his lifetime are prohibited by Section 347 because she was a "party or person interested in the event" and thereby stood both individually and as Executrix and still stands in a position of personal profit or gain. A party or person interested in the event in such circumstances is "disqualified from testifying".

The argument that plaintiff Baumet Sr. may have "opened the door" is untenable insofar as the infants are concerned. The four infant appellants appeared by Guardian ad Litem, they are separate and distinct parties to this action and appeal and their rights cannot be prejudiced by Baumet Sr. When the Trial Court dismissed Baumet Sr.'s complaint, he was ruled out as a party to the action and the trial then began between the infants and Julie Peters which was an entirely separate suit.

The District Court was bound to provide the infants with the protection of Section 347, *supra*. *Harris* v. *Morse*, 54 Fed. 2d, 109.

It is submitted that the rights of the infants are absolute under the Act, if for any reason the natural father dies or becomes legally disabled, and not contingent as found by the Court of Appeals. The Court of Appeals erred when it refused to review the infants' appeal and agreed with the erroneous concession made by counsel for the infants in that Court. It is submitted that the rights of infants cannot be prejudiced or surrendered by counsel and that the Courts are ever zealous to protect their rights.

Conclusion.

It is respectfully submitted that the decisions of the Court of Appeals (*Baumet* v. *United States, et al.* 191 F. 2d 194 and 177 F. 2d 806) and the decision of the District Court (*Baumet* v. *United States, et al.*, not reported, Clancy U. S. D. J. filed November 3, 1950, S. D. N. Y.) should be reversed and the decision of the District Court (*Baumet* v. *United States, et al.* 81 Fed. Supp. 1012) should be affirmed with costs in all courts and that an order should be made directing the government to make all payments to the appellant, William Baumet or in the event of his death or legal disability, that all payments be made to the infant appellants Harriet, Joan, Lionel and Dwight Baumet, by Catherine Baumet, their guardian *ad litem*.

Respectfully submitted,

Louis A. D'Agosto,
Counsel for Appellants.

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No. 39

In the Supreme Court of the United States

OCTOBER TERM, 1952

WILLIAM BAUMET, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (A. 1)[1] is reported at 81 F. Supp. 1012. The opinion of that Court dated November 3, 1950 (A. 10) is unreported. The opinions of the Court of Appeals (A. 7, 25) are reported at 177 F. 2d 806, certiorari denied, 339 U. S. 923, 973, and 191 F. 2d 194.

[1] The record below has not been printed. The opinions of the courts below have been printed separately as an Appendix to this brief. The references "(A.)" in this brief are to this Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on July 23, 1951 (A. 34). The petition for a writ of certiorari, filed on November 15, 1951, was granted on April 21, 1952. The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether Section 602 of the National Service Life Insurance Act, which conditions a beneficiary's rights "upon his or her being alive to receive * * * payments" and prohibits payments "to the heirs or legal representatives * * * of any beneficiary", precludes payments to the legal representative of a beneficiary who survived the insured but died before receiving any of the proceeds of the policy.

2. Whether the natural father of the insured, who was succeeded in the paternal relationship by an uncle standing *in loco parentis* to the insured, may be regarded, upon the death of the uncle, as a parent "who last bore that relationship" within the meaning of Section 602 (h) (3) (c).[2]

STATUTES INVOLVED

The pertinent statutory provisions are set

[2] The petitioner raises other questions which relate only to the conduct of the trial in this case, and upon which the United States takes no position.

forth in Appendix A to the Government's brief in *United States* v. *Clara Belle Henning, et al.*, No. 10, this Term, to be argued immediately preceeding the instant case.

STATEMENT

This suit is based upon conflicting claims to the proceeds of a National Service Life Insurance policy in the amount of $10,000 issued to William Baumet, Jr. (A. 16). At the time of the insured's death, on October 26, 1942, his uncle, John J. Peters was the designated beneficiary of his policy (A. 1, 16–17). After the insured's death, his natural father, petitioner here, and his uncle filed claims with the Veterans Administration for the insurance benefits (A. 1). The Administrator decided in favor of the uncle as a person standing *in loco parentis* to the insured (A. 1). Thereafter, the father instituted this action against the United States to recover the proceeds of the policy; the uncle intervened and filed a cross claim (A. 2).

Before the action came to trial, the uncle died and his widow, Julie Peters, filed a motion to be substituted as executrix of his estate (A. 2). The district court held that Section 602 (i) and (j) of the National Service Life Insurance Act of 1940 prohibited payments to the estate of a beneficiary and denied the motion of the executrix for substitution (A. 6). This decision was reversed by the Court of Appeals on the ground that a beneficiary's right to installments vested if he was alive

to receive them, whether or not he in fact received them, and therefore passed to his estate (A. 9).

Upon the trial following this reversal, Julie Peters, in addition to claiming as executrix the installments which matured before her husband's death, also claimed subsequent installments individually as a person standing *in loco parentis* to the insured (A. 23, 27). At the conclusion of the trial, the district court made findings which may be summarized as follows (A. 10–15):

Some five years after the insured was born in 1920, his mother left her husband and took the insured to live with her (A. 10). His parents were divorced in 1927, and he continued to live with his mother until her death in 1936 when he came to live with his father (A. 10–11). The insured's mother had left an insurance fund of some $1,700.00 of which his father was appointed general guardian (A. 11). In September 1937, the insured entered the University of Wisconsin, and in November 1938, without notifying his father, left college for Florida (A. 11–12). At the insured's request, the Florida police notified his uncle, John J. Peters, who provided funds for his return (A. 12). Upon his return, he made his home with his uncle and aunt who assumed a parental role toward him (A. 12–16).

After the father's administration of the trust fund had been questioned, a conference was held in December 1938, attended by the father, the insured, his uncle, and attorneys, at which the

father made a contribution to the fund, then entrusted to the uncle, and resigned as his son's guardian (A. 12–13). After this meeting, the father "never saw his son again and took no measures to look for or after him in any respect whatever and manifested no interest in his career * * *. His conduct constituted an abandonment of his son" (A. 13).

The insured returned to Wisconsin University in 1939 and, while his tuition for this year was paid out of the trust fund, other funds were supplied by his aunt and uncle (A. 14). In June 1941, at the end of the school year, he entered the naval reserve (A. 14–15). From the time he entered the service until his death, he always reported John J. Peters as his next of kin and his adopted father, and the address of John and Julie Peters as his home (A. 15–16). In his application for National Service Life Insurance, he listed his uncle as an adopted father, and designated him as beneficiary of his insurance policy (A. 16–17).

The district court found that the insured's conduct "is consonant only with an understanding on his part that they occupied the estate and position of his parents and that they on their part intended to establish and maintain that relationship to him. They were in every sense after 1938 *in loco parentis* to him" (A. 17–18). The district court concluded as a matter of law that Julie Peters was entitled, as executrix, to the sums accrued and unpaid during the life of John Peters,

and, as a person standing *in loco parentis*, to all sums accruing on the policy after his death (A. 18).

The court of appeals affirmed the district court's finding that John and Julie Peters stood *in loco parentis* (A. 39), and held that after the death of the designated beneficiary, John Peters, his wife, Julie Peters, was entitled to the proceeds of the policy to the exclusion of his natural father, petitioner here (A. 40–41). It ruled that only the parent "who last bore that relationship" is within the limited class of non-designated statutory beneficiaries and that since John Peters last bore the relationship of father to the insured, that the natural father, William Baumet, "cannot satisfy the statutory requirement" (A. 40–41).

ARGUMENT

The issues here involved are virtually identical with those presented in *United States* v. *Clara Belle Henning*, No. 10, this Term, No. 456, last Term. The arguments made in the Government's brief in that case are directly pertinent and will not be repeated. We wish to add only that the Congressional policy of limiting classes of beneficiaries and prohibiting payments to estates has its roots in comparable principles incorporated into World War I war risk insurance legislation. The National Service Life Insurance Act of 1940, as amended, as well as the Servicemen's Indem-

nity Act of 1951, were enacted against the background of this earlier legislation and in the light of both administrative and judicial interpretations giving clear effect to the expressed statutory policy of permitting payments only to specified beneficiaries and denying them to estates. See *United States* v. *Lee*, 101 F. 2d 472 (C. A. 6); *American Nat. Bank & Trust Co.* v. *United States*, 134 F. 2d 674 (C. A. D. C.). Compare *Northwestern Mut. Life Ins. Co.* v. *Fink*, 118 F. 2d 761 (C. A. 6).

The decisions in the *Lee* and *American Nat. Bank* cases not only rule against paying benefits to decedent's estates, but recount the legislative and administrative background for this result. In the *Lee* case, dealing with revived war risk insurance, the court stated (p. 474):

> This history shows that it was the clear intent of the Congress that only living persons were to be beneficiaries, and that no estate should be a beneficiary under this section.

In the *American Nat. Bank* case, dealing with a similar situation, the court observed (p. 678):

> The purpose to restrict payment to the persons designated and, by the same token, to exclude participation by any estate hardly could be stated more clearly. And this policy has been carried out consistently in the Bureau's administrative application of the section.

In these circumstances, the statutory language under consideration here, expressly forbidding payments to estates, must be deemed to have been used deliberately and should be applied in the precise terms which Congress used.[3]

Moreover, the fact that the limitation of benefits to a narrowly defined class (to whom the serviceman might owe some obligation of support) would at times result in no insurance payments was clearly understood as early as 1917. See Hearings before the Senate Subcommittee of the Committee on Finance on H. R. 5723, 65th Cong., 1st Sess. (later enacted as the Act of October 6, 1917, Public Law 90, 65th Cong.), August 17, 1917, p. 78, September 18, 1917, pp. 23, 44–45, 93; see also Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 11659, 65th Cong., 2d sess. (later enacted as Public Law 175, 65th Cong., June 25, 1918), May 1, 1918, pp. 16–17.[4]

---

[3] This policy against paying insurance benefits to a deceased beneficiary's estate is consistent with 38 U. S. C. 454a, made a part of the National Service Life Insurance Act by 38 U. S. C. 816, which, as noted by this Court in *Wissner* v. *Wissner*, 338 U. S. 655, 659, exempted payments to named beneficiaries from the claims of creditors.

[4] It is significant that in the transition to a peacetime insurance basis after World War I, as under the National Service Life Insurance Act, the permissible class of beneficiaries was enlarged and specific provision was made for the payment of insurance proceeds to estates. Compare Section 402 of Public Law 90, 65th Cong. (40 Stat. 409, 410), as amended by Public Law 175, 65th Cong. (40 Stat. 609, 615), with Public Law 104, 66th Cong. (41 Stat. 376), Sections 14, 15, and 16.

CONCLUSION

For the foregoing reasons, and those stated in the Brief for the United States in *United States* v. *Henning, supra,* it is respectfully submitted that all insurance proceeds should be held payable to the insured's aunt, Julie Peters, not as the executrix of the estate of John J. Peters, but as one who stood *in loco parentis* to the insured.

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UNITED STATES OF AMERICA and JOHN J. PETERS

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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APPENDIX TO THE BRIEF FOR THE UNITED STATES

United States District Court

SOUTHERN DISTRICT OF NEW YORK

Civil 26-397.

WILLIAM BAUMET, *Plaintiff*

against

UNITED STATES OF AMERICA and JOHN J. PETERS, *Defendants.*

Opinion

KAUFMAN, D. J.

William Baumet, Jr. died on October 26, 1942, while in active military service in the armed forces of the United States. As beneficiary of the proceeds of his National Service Life Insurance policy, he had designated his uncle, John J. Peters. After Baumet's death, both the plaintiff, his natural father, and Peters, his uncle, filed claims with the Veterans Administration for the proceeds of the policy. After investigation, the Administrator determined that the uncle stood in the relation of *loco parentis* to the insured, and was entitled to the fund (see *National Service Life Insurance Act of 1940* [38 U.S.C. 801 ff]

§602(g)). Thereafter, pursuant to §617 of the Act, the father instituted this action against the United States to recover the proceeds of the policy.

Peters, the uncle, was permitted to intervene in the action and filed a crossclaim against the United States, demanding that the proceeds of the policy be paid to him.

Thereupon, the Veterans Administration withheld payment from both claimants, and the disposition of the fund is awaiting the determination of this action.

Four years after the determination by the Administrator that Peters was entitled to the fund, but before this action had come to trial, Peters died. This motion was thereupon made by his executrix, Julie Peters, for an order substituting her as a defendant herein in his stead.

Rule 25(a)(1) of the Federal Rules of Civil Procedure, providing for substitution, declares:

> "If a party dies and the claim is not thereby extinguished, the court within 2 years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party."

Under this Rule, the court may order substitution of Peters' executrix only if Peters' claim to all or part of the proceeds of the policy has not

been extinguished by his death (*Edner* v. *Mathews*, 44 F. Supp. 873; *Kamoses* v. *Martin*, 6 F.R.D. 585).

Under the Act, the proceeds of the policy are payable in installments (Sec. 602(h)).

The executrix argues, in effect, that the finding by the Administrator that Peters was entitled to the award under the policy was a final and binding determination which vested Peters with the right to all installments which fell due prior to his death, and that his executrix is entitled to be substituted herein in order that she may recover the amount thereof.

That contention is untenable under the Act. Section 617 of the Act provides:

> "In the event of a disagreement as to claim arising under this part, suit may be brought in the same manner and subject to the same conditions and limitations as are applicable to United States Government (converted) life insurance under the provisions of sections 19 and 500 of the World War Veterans' Act, 1924, as amended: *Provided* that in any such suit the decision of the Administrator as to waiver or nonwaiver of premiums under section 602(n) shall be conclusive and binding on the court."

From this it follows that, except for the decision of the Administrator as to waiver or non-

waiver of premiums under §602(n) of the Act—a matter not here involved—the issues tendered in the action are to be resolved by judicial, and not administrative, determination.

The Act is clear and unequivocal in making the existence in being of the beneficiary at the time of payment a condition of the making of payment, irrespective of when payment fell due under the terms of the policy. Section 602(i) specifically declares that:

> "* * * The right of any beneficiary to payment of any installments shall be conditioned upon his or her being alive to receive such payments. No person shall have a vested right to any installment or installments of any such insurance and any installments not paid to a beneficiary during such beneficiary's lifetime shall be paid to the beneficiary or beneficiaries within the permitted class next entitled to priority * * *."

Section 602(j) directly prohibits the payment of any such installments to the estate of the beneficiary, as such: It provides that:

> "No installments of such insurance shall be paid to the heirs or legal representatives as such of the insured or of any beneficiary, and in the event that no person within the permitted class survives to receive the insurance

or any part thereof no payment of the unpaid installments shall be made."

Under the provisions of these sections of the Act, no rights are conferred on a beneficiary with respect to installments which fall due, but are not paid to the beneficiary, during his lifetime, and such installments do not inure to the beneficiary's estate upon the latter's death (See *Carpenter* v. *United States*, 72 F. Supp. 510; *Washburn* v. *United States*, 63 F. Supp. 224, 228).

Where Congress has sought to confer legally enforceable rights to installments due, but unpaid, upon the estates of beneficiaries under government life insurance policies, it has done so in clear and unambiguous language. Thus, under the World War Veterans' Act of 1924, as amended, Section 26 (38 U.S.C. 451), accrued installments of insurance unpaid at the time of the death of the beneficiary could be paid to the beneficiary's personal representatives, while the present value of all installments not yet due fell to the estate of the insured (Section 303 (38 U.S.C. 514)). The meaning of this specific statutory language was explained in *Lopez* v. *United States*, 82 F. (2d) 982, where the court said:

"The result of these enactments is that when a liability under a policy is established, but the insurance has not been paid prior to the death of the insured, the installments which would have accumulated from the date

> of the insured's permanent and total disability to the date of his death should be paid to his estate, while those which would have accumulated from his death to the date of the death of the beneficiary should be paid to the estate of the beneficiary, and the commuted value of the installments remaining should be paid to the estate of the insured." (p. 986).

The effect of the 1924 Act, therefore, was to provide a clear and precise statutory scheme whereby installments accrued, but unpaid, during the lifetime of the beneficiary, became part of the latter's estate (*McCullough* v. *Smith*, 293 U.S. 228; *Singleton* v. *Cheek*, 284 U.S. 493). But by subsections (i) and (j) of Section 602 of the National Service Life Insurance Act of 1940, Congress expressed a contrary intent with regard to all policies maturing before August 1, 1946. Consequently, John J. Peters' claims under the policy were extinguished by his death; his executrix has no interest in the policy, and the motion to substitute her for him must be denied.

Rule 25 (a) (1) also requires that the action, with regard to the deceased Peters, be dismissed (*Anderson* v. *Yungkau*, 329 U. S. 482)

Settle order on notice.

December 31, 1948.

/S/ SAMUEL H. KAUFMAN
UNITED STATES DISTRICT JUDGE.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 44—October Term, 1949.

(Argued October 14, 1949

Decided October 28, 1949.)

Docket No. 21409

WILLIAM BAUMET, *Plaintiff-Appellee,*

v.

UNITED STATES OF AMERICA, *Defendant-Appellee,*

—and—

JOHN J. PETERS, *Defendant,*

—and—

JULIE PETERS, Executrix of the Last Will and Testament of John J. Peters, Deceased,

Appellant.

Before: AUGUSTUS N. HAND, CHASE and FRANK, *Circuit Judges.*

Appeal from an order of the United States District Court for the Southern District of New York. *Reversed.*

SAMUEL SEGAL, *for plaintiff-appellee;*

SIMPSON THACHER & BARTLETT (Thomas Thacher, of counsel) *for appellant.*

The facts are fully stated in the opinion of the district court, reported in 81 Fed. Supp. 1012.

FRANK, *Circuit Judge:*

The district court so interpreted the statute as to reach a result which ascribes to Congress a capricious purpose. Doubtless the court arrived reluctantly at this conclusion, for such an interpretation should be rejected unless inescapable.

"On this appeal, we must assume that, were plaintiff permitted to remain in this litigation, the district court would find that certain instalments came due and were payable to Peters during his lifetime. But the district court's interpretation would deny those payments to Peters' estate—and give them to the father—simply because the officer charged with paying them delayed in so doing until Peters died. This result is shocking." For the delay resulted solely from the fact that the father, whom the Administrator had previously held entitled to nothing while Peters lived, began a suit to overturn that decision. Under the district court's ruling, the father wins the instalments, no matter how specious his claim, if only he can make his law-suit outlive Peters. We think that such an unreasonable interpretation of the statute can and should be escaped.

Section 602(i)—38 U. S. C. A. §802(i)—provides: "The right of any beneficiary to payment

of any instalments shall be conditioned upon his or her being alive to receive such payments." The right to payment is not conditioned upon the beneficiary's being alive when such payments happen to be made, but "upon his or her being alive to receive such payments." As Peters was alive and ready to receive the accrued instalments, the statutory condition was satisfied, and the right to those instalments became vested in him.

All the other provisions of the statute on which the district court relied must, we think, be read in the light of the language we have quoted. Those other provisions showed that Congress intended this and no more: no rights should vest in (or in behalf of) any beneficiary merely because of the maturity of the policy during the life of the designated beneficiary, except in so far as that beneficiary continued to live as instalments fell due. Congress did not specifically cover the situation present here, *i.e.*, a delay in paying instalments that came due while the designated beneficiary still lived. But, having in mind the obvious over-all common-sensible purpose of the statute, we think that Congress intended that, in such circumstances, the right to those instalments should become irrevocably fixed in the beneficiary and should therefore pass to his estate.

REVERSED.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

WILLIAM BAUMET, *Plaintiff*

against

UNITED STATES OF AMERICA, JULIE PETERS, individually and as executrix of the last will and testament of John J. Peters, Deceased, and HARRIET, JOAN, LIONEL and DWIGHT BAUMET, Infants by Catherine Baumet, their Guardian ad Litem.

Defendants

Opinion

CLANCY, D. J.

1. Plaintiff is the father and Alice Peters Baumet was the mother of William Baumet, Jr. born on April 5, 1920. Some five years later Alice Baumet left her husband and took their son with her to her mother's house where lived other members of the Peters family, one of whom was her brother, John J. Peters. She was divorced in 1927 the decree requiring payment by the plaintiff to the wife for support of herself and their son of the sum of $50. monthly. Thereafter and sometime in 1929 Alice Baumet moved to Albany with her son and lived there until 1932, when she remarried. Plaintiff meantime lived in Chicago, Detroit and New York and sent few and inconsiderable sums of money at infrequent intervals to Alice Baumet and some to the boy after her remarriage.

2. In 1936, Alice Baumet died and William Baumet, Jr. then came to live with his father who had remarried and then had two other children. The family lived in a four room apartment and William Baumet, Jr. was given one room while the plaintiff, his wife and two children occupied another. William Baumet, Jr. lived with them from 1936 to 1937 and attended high school from which he was graduated in 1937. The mother left to William Baumet, Jr. insurance monies which less expenses, amounted to something in excess of $1700 and plaintiff was appointed general guardian of the son's person and of his property, the insurance money. More than $1600 of this sum had been withdrawn and spent in December, 1938.

3. In September, 1937, William Baumet, Jr. entered the University of Wisconsin, at Madison, Wisconsin. On finishing his Freshman year he stayed in Wisconsin working. He returned to his father's home for a visit of ten days before he returned to the University for his Sophomore year. His tuition for that year was paid by the plaintiff out of William Baumet, Jr.'s trust fund and some money for living expenses was paid to him out of the same fund. Whatever monies were actually forwarded to him by the plaintiff he contracted debts to the student fund and to his fellows at college to such an extent that his embarrassment at his inability to repay them caused him to leave college in November, 1938, without notifying his

father, whom he blamed for the situation. His aunt, Betty Peters, and his uncle, John J. Peters, were notified by the Florida police on his advice as the persons most likely to help him and who would be interested in his situation. The Florida police apparently had picked him up for investigation upon his arrival there alone. John J. Peters sent the police the money for William Jr.'s travel to his home and William Baumet, Jr., returned to the home of John J. Peters and lived there always thereafter. Immediately upon his return Julie Peters—the husband's business being just then new and not too profitable—with funds procured by the sale of a fur piece of hers, purchased for the youth a complete wardrobe. Thereafter she continuously looked after the laundry, repair, maintenance and replacement of his clothing.

4. Before this time the plaintiff was subjected to a compulsory accounting in the Surrogate's Court of New York County of his disbursement of the monies belonging to his son and reported to the Special Guardian appointed by the Surrogates' Court that he sent him $50. monthly in accordance with an order of the Surrogate. Whether any or if any particular money vouchers for these payments were submitted to the special guardian did not appear but the account was approved. In 1938 he was again compelled to account. At that time the fund was depleted to a

sum less than $100. This accounting was brought about by a written complaint registered by the son with one of the clerks of the Surrogates' Court that the plaintiff was misappropriating the funds of which he was the guardian. In December, 1938, by some arrangement which was not elucidated and after the boy's return from Florida, plaintiff was confronted by his son at the office of a New York attorney. The son was accompanied by John J. Peters with whom he was living and Peter's lawyer and whatever developed, the conference ended in plaintiff's resignation as his son's guardian. The residue of the fund, then less than $100, together with a contribution by the plaintiff which brought the amount to $341, was then entrusted to the uncle, John J. Peters as guardian of the property of William Baumet, Jr.

5. After this meeting at the attorney's office plaintiff never saw his son again and took no measures to look for or after him in any respect whatever and manifested no interest in his career and extended no care even in the slightest degree. His conduct constituted an abandonment of his son.

6. In 1939, after a reprimand from Julie Peters, William Baumet, Jr. ran away and lived in a furnished room for five days. Julie Peters, accompanied by Betty Peters, located him and went after him and he returned of his own volition with them to the Peters home.

7. At the insistence of John and Julie Peters some time in May, (1939), William Baumet Jr. visited Wisconsin University to apply for re-admission for the 1939 Fall term. He was re-admitted to the University and some time in the summer of that year returned to Madison, Wisconsin, and obtained employment. Julie Peters supplied him with the funds necessary to pay the debts owed to the University fund and to student creditors, a necessary requisite to his readmission to the University. Julie Peters also supplied him with the travelling expenses. William Baumet, Jr.'s tuition for the 1939 Fall term was paid by his uncle out of the trust fund. William Baumet, Jr. remained at the University until some time in January, 1940 when he left school with a broken wrist and returned to the home of John and Julie Peters, where he remained until sometime in the early summer of 1940, when, at the urging of John and Julie Peters, he again returned to Madison, Wisconsin, to arrange his re-entry into the University of Wisconsin in September of 1940. He remained there for the full school year with the exception of the Christmas vacation which he spent at the home of John and Julie Peters. The guardianship account was necessarily exhausted at or before April, 1941, however sparingly it was dispensed and the only source of funds to educate and support him other than the small sums earned at two jobs, was John and Julie Peters. In June

of 1941, at the end of the school year, he entered the United States Naval Reserve. At all times during this period he had a room at the home of John and Julie Peters. It contained such personal possessions as he had not taken to school with him. During all of these times John and Julie Peters and William Baumet, Jr. carried on a correspondence marked by interest in each other and affection on both sides. Also during all of these times both John and Julie Peters sent him sums of money out of their own funds and for not only his needs such as dental bills but for his spending money. The letters on both sides evidenced that William Baumet, Jr. looked to John and Julie Peters as those persons on whom he could call for money as he needed it and they evinced a willingness to assume and defrayed as a duty the expenses of his maintenance and education at times. At times while he was in Wisconsin, William Baumet, Jr. was employed and earned comparatively paltry sums which he used for his own maintenance. There is no pretense anywhere in the evidence that he ever earned enough for his own support and tuition.

8. From June, 1941, when William Baumet, Jr. entered the service, until the time of his death, October 26, 1942, he was in frequent communication with John and Julie Peters by mail. In all of his applications and reports, both when he entered the service and on other occasions in his

life as a cadet flyer, he gave John J. Peters as his next of kin and as his adopted father and the address of John and Julie Peters as home. He progressed rapidly as a student at the flying school and was commissioned as a Marine flyer. In his correspondence with John Peters he explained his manner of spending his salary and expressed his intention to return for a vacation which was subsequently disallowed, and when he was sent from the school at Tallahassee to service in the West, he forwarded his clothes and such personal effects as he could not carry with him to the Peters home to be kept until his return from service. After William Baumet, Jr. entered into active service he still maintained his correspondence with John Peters and he referred unfailingly and with affection to Julie Peters.

9. On October 3, 1941, he applied for National Serice Life Insurance and a certificate for insurance in the sum of $10,000 was issued to him effective as of that date. The certificate was in full force and effect when he was killed at Guadacanal while in the service on October 26, 1942. In his application for this certificate of insurance he listed John J. Peters as his adopted father. He had his will stored in a metal box which was forwarded by the military authorities to John Peters as the decedents' next of kin. In it he disposed of a few hundred dollars to friends and recited the fact that John Peters was bene-

ficiary of his insurance policy and appointed John Peters as administrator of his estate.

10. During all this time following his leaving the University of Wisconsin, until the Fall of 1938, William Baumet, Jr. did not write to his father. He referred to him in his correspondence with John Peters and not in endearing or even respectful terms but on the contrary with expressions of distrust.

11. William Baumet, Jr. was a young man of good character and habits, not given to waywardness or disobedience. He was encouraged in virtue by John and Julie Peters and he respected and ordinarily obeyed their directions and accepted their authority. They went far out of their way to raise him in the practice of the religion he had inherited. In all things spiritual they were his guides and supervisors and in the development of his character which had its flowering in the course of his military service, they played a chief and laudable part. It was conclusively proved by all of the evidence in the case and is found that in 1938 John and Julie Peters assumed as a voluntary obligation, the duty of supporting William Baumet, Jr. and that they performed this duty throughout the rest of William Baumet, Jr.'s life. It was also proved that he looked to them for his support and accepted it as becoming his relationship to them. His conduct is consonant only with

an understanding on his part that they occupied the estate and position of his parents and that they on their part intended to establish and maintain that relationship to him. They were in every sense after 1938 in loco parentis to him in the most real, dutiful and happy sense of that phrase. They occupied that relationship at his death.

12. On or about May 18, 1944, it was determined by the Administrator of Veterans Affairs that John J. Peters stood in loco parentis to the insured within the meaning of the National Life Insurance Act and that his designation as beneficiary was valid.

Conclusions of Law

1. The complaint of William Baumet is dismissed.

2. Julie Peters, as Executrix of the Estate of John J. Peters, is entitled to the sums accrued but unpaid on the insurance policy on the life of *William Baumet, Jr. Baumet* v. *U.S.*, 177 Fed. (2d) 806.

3. Julie Peters, individually, is entitled to payment to her as a person in loco parentis of William Baumet, Jr., of all sums accruing on the policy on the life of William Baumet, Jr., after the date of the death of John J. Peters; i.e., June 28, 1948.

Plaintiff contends wherever William Baumet, Jr. resided at the time of his death and before, his domicile was that of the father as a matter of law, citing *Matter of Thorne,* 240 N. Y. 444, where a parent who had never abandoned her son survived. It has been found that the plaintiff abandoned his son in 1938 and it has been held in New York that an emancipated infant whose mother is dead could establish his own domicile. *Cohen* v. *Delaware, Lackawanna & Western R. R. Co.,* 150 Misc. 450. See too *Delqware, Lackawanna & Western R. R. Co.* v. *Petrowsky,* 250 Fed. 554. But we do not believe the decedent's legal domicile, if it were held to be other than Peter's home, is determinative of the plaintiff's claim. Both Julie and John J. Peters have fully met the test of a claim of an estate in loco parentis to the decedent to qualify themselves as beneficiaries of the decedent's policy in accordance with his selection of John Peters. It was demonstrated to a conclusion by the evidence of his way of life after 1938, when he became wholly dependent both corporeally and spiritually on John J. Peters and his wife. Decedent had no other means of support, for his earnings were comparatively inconsiderable. Everything that could have been done by natural parents in the way of his support, in the promotion of his interest and his future in the development of his character and the nurturing of decent aspirations was done by John and Julie

Peters and the doing of it all was accompanied by an affectionate devotion that called for a degree of self denial.

Plaintiff's contention that it should not be within the competence of a minor child to sever all relationship of parent and child by the mere exercise of his own volition even when that is persistent, is a distraction. The plaintiff has no answer to the charge against him borne out by the evidence. Even though he has the advantage of a presumption founded in the law of nature that the relationship of natural parents to their offspring persists, it was his own conduct, proved indeed out of his own mouth on cross-examination as well as by the other evidence, that overwhelmed the presumption and sustained the intervening defendants' case. When the plaintiff's first wife died she left a fund for the youth who thereafter lived for a year with the father. So far as can be found in the evidence plaintiff never contributed to his support from his own earnings. He made continual drafts on the son's money in his custody as guardian. It would be quite possible that a young man at college would contract debts for considerations that would not deserve his father's respect. There is no evidence that William Balmet, Jr. was a gambler or a boy of bad habits. The sums owed by him were to the college fund which undoubtedly asked the reason for borrowing it and to his college mates in sums that were

consonant with the life of any good boy at college and the Court is convinced the borrowings were obtained to meet the need for current expenses which the plaintiff's failure to contribute to him even out of the son's own money left the boy unable to meet. In 1937 plaintiff swore in his compulsory account he was withdrawing $30 monthly for the boy's support although he had him living in miserable circumstances. This would be quite within the rights of a poor father and we do not mean that the plaintiff at that time was rich but he himself puts forward the claim that he was then supporting his son out of his own money which he certainly was not doing. If we accept the plaintiff's own story, he was advised by Betty Peters, a deceased aunt, that the boy had run away from college and was in Florida in 1938. He made no effort to find where the boy was and his own testimony indicates a conduct at this juncture in the boy's life wholly unlike what would be expected of a father. The son's judgment was fully confirmed. The conference with Peters was held in the office of the father's attorney. He says that he demanded that the boy return home. It was not testified that all of the three lawyers of that conference were dead but none was produced. The outcome of it was the plaintiff's resignation as guardian. The last two times when plaintiff saw his son he was in company with John J. Peters. It is plain that plaintiff then knew and

had earlier known that his son was at the Peter's home and had been there and thereafter was still there. Nevertheless he did nothing to regain custody of his son. The son had no further funds and whether that was the cause of the father's conduct, the fact remains that he made no effort whatever to visit his son or to effect any contact with him. The conclusion is compelled from all of this conduct's own part that he abandoned his son.

Plaintiff also makes a point that the decree of the Surrogate's Court appointed John J. Peters as guardian of the infant's property only, leaving the plaintiff guardian of the person. The proceeding for the guardian's discharge was apparently exparte and instituted by a specially designated special guardian because of the plaintiff's default in accounting. Any conclusion favorable to the plaintiff that a reasonable man would attempt to derive from the Surrogate's decree would meet with immediate and complete contradiction from everything that transpired thereafter in the plaintiff's life and in the relationship between himself and his son. It was certainly a peculiar guardianship of the person that he exercised for it was exercised wholly in absentia in as much as he had not seen his son for six months before and never before. The accounting was an exparte proceeding before a special guardian specially designated and to procure it

for his failure in filing his annual account. It furnished no support for plaintiff's claim and implies a good deal to hurt it.

No reason appears why the terms of the insurance certificate in this case should not be literally enforced. No person appears entitled at the time of his death except John J. Peters whom he specifically named as beneficiary. It has already been decided in this very case, 177 Fed. (2d) 806, by our Court of Appeals that John J. Peters if otherwise eligible is entitled to payment of the sums accrued while he lived during the pendency of this action. This eligibility has been demonstrated and his executrix takes such sums. His widow was in loco parentis to the decedent from 1938 to the time of his death. She and nobody else comes within the statute's definition of parent, *Leverly* v. *U. S.* 162, Fed. (2) 79, at 85, et seq., and the regulation adopted by the Veterans' Administration, *Veterans Regulation No. 10,* Subd. VII, 38 U.S.C.A. 1949, pocket Part Pg. 208. She is therefore the only person entitled to the amounts coming due after the date of her husband's death.

The argument of the plaintiff that the claim of Julie Peters is outlawed by the statute of limitations, 38 U.S.C.A. 445, is invalid. Her cause of action obviously came into being in June, 1948. She cross-claimed in this action and filed a formal claim with the Veterans' Administration in

December of that year. The certificate of insurance itself subjects the parties to it to all the amendments of the law. So we regard the suggestion of the plaintiff advanced since the trial, that the 1944 amendment which included a person in loco parentis within the definition of parent was not retroactive, as insubstantial.

Although the Court dismissed the plaintiff's complaint at the close of the plaintiff's case, this decision has been arrived at on the entire case.

JOHN W. CLANCY
United States District

Dated New York, N. Y.,
November 3, 1950

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Order and Final Judgment

Civ. 26-397

WILLIAM BAUMET, *Plaintiff*,

– against –

UNITED STATES OF AMERICA, JULIE PETERS individually and as executrix of the last will and testament of John J. Peters, Deceased, and Harriet, Joan, Lionel and Dwight Baumet, Infants, by Catherine Baumet, their Guardian ad Litem, *Defendants*.

The plaintiff William Baumet having filed his complaint herein against defendant United States of America, demanding payment to him of certain benefits payable under a policy of National Service Life Insurance bearing No. 5,005,826 issued to William Baumet, Jr., deceased, by defendant United States of America; John J. Peters, the beneficiary named in said policy of National Service Life Insurance, having by order of this Court been permitted to intervene in this cause as an additional party defendant; defendant John J. Peters having thereupon served and filed an answer to the complaint and a cross-claim against defendant United States of America demanding

payment to said defendant John J. Peters of said proceeds; the plaintiff having served and filed a reply to said answer and cross-claim of defendant John J. Peters; defendant United States of America having served and filed an answer to the complaint and a reply to the cross-claim of defendant John J. Peters; two pre-trial conferences having been held herein; defendant John J. Peters having served and filed an amended answer and cross-claim pursuant to a pre-trial order of this Court; defendant John J. Peters having died before this cause came on for trial; Julie Peters, executrix of the last will and testament of John J. Peters, deceased, having moved for an order for her substitution as a defendant herein in place of the said John J. Peters; an order of this Court denying such motion having been reversed by the Court of Appeals for the Second Circuit and plaintiff's motion for a rehearing having been denied by the said Court of Appeals, and plaintiff's petition for writ of certiorari having been denied by the Supreme Court of the United States, and plaintiff's motion for leave to file a petition for rehearing of his petition for writ of certiorari having been denied, and an order on the mandate of said Court of Appeals, allowing the substitution of Julie Peters, executrix of the last will and testament of John J. Peters, deceased, as a defendant herein in place of the said John J. Peters having been made and filed by this Court;

the motion of Julie Peters, individually, for leave to intervene herein, having been granted by this Court, and said Julie Peters, individually, having served and filed her answer and cross-claim herein; plaintiff having thereupon served and filed his reply to the answer and cross-claim of Julie Peters; the motion of Catherine Baumet, as Guardian ad Litem of Harriet, John, Lionel and Dwight Baumet, infants, for leave to intervene having been granted by order of this Court, and said infants having served and filed their answer and cross-claim herein; and defendant Julie Peters having served and filed her reply to the cross-claim of Harriet, Joan, Lionel and Dwight Baumet, infants; a third pre-trial conference having been had; the motion of Julie Peters that this cause be brought on for trial peremptorily on the first day of the 1950 term, having been granted by order of this Court; the issues in this action having thereafter come on regularly for trial before the Honorable John W. Clancy, sitting without a jury, commencing on the 6th day of October, 1950 and continuing thereafter until concluded on the 11th day of October, 1950, at the United States Court House in and for the Southern District of New York; all parties having appeared by attorney and full hearing and due deliberation having been had, the defendant Julie Peters, individually and as executrix of the last will and testament of John J. Peters, deceased, having moved

for judgment dismissing the complaint of the plaintiff William Baumet, dismissing the cross-claim of the infant defendants Harriet, Joan, Lionel and Dwight Baumet, and for judgment in favor of the defendant Julie Peters, individually and as executrix, against the United States of America, as prayed for in the cross-claim of John J. Peters, deceased, and the cross-claim of Julie Peters; the Court having made and filed on the 3rd day of November, 1950 certain findings of fact and conclusions of law and a decision in favor of the defendant Julie Peters, individually and as executrix of the last will and testament of John J. Peters, deceased, directing judgment as hereinafter stated; and costs to said defendant Julie Peters against plaintiff being allowable according to law, and the costs of the said defendant Julie Peters having been duly taxed at One Hundred forty-two and 62/100 dollars ($142.62);

Now, on motion of Messrs. Simpson Thacher & Bartlett, attorneys for said defendant Julie Peters,

IT IS ORDERED, ADJUDGED AND DECREED that

1. The complaint of the plaintiff be dismissed on the merits, with prejudice;

2. The cross-claim of the infant defendants be dismissed on the merits with prejudice;

3. The motion of Julie Peters, as executrix

of the last will and testament of John J. Peters, deceased, for judgment on the amended answer and cross-claim of said John J. Peters be granted;

4. The motion of Julie Peters, individually, for judgment on her answer and cross-claim, be granted;

5. The defendant, Julie Peters, individually and as executrix, recover of the defendant United States of America the proceeds of a certain policy of National Service Life Insurance bearing No. 5,005,826, according to the terms of the refund life income plan of settlement (Option 4, as selected by said Julie Peters in her affidavit dated November 20, attached hereto;

6. The defendant, Julie Peters, as executrix of the last will and testament of John J. Peters, deceased, recover of the defendant United States of America, the sum of Three thousand six hundred ninety-eight Dollars and forty cents ($3,698.40), being the sum accrued on June 28, 1948, but unpaid on that date, upon National Service Life Insurance policy No. 5,005,826;

7. The defendant, Julie Peters, individually, recover of the defendant United States of America, the sum of One thousand

five hundred Dollars and eighty cents ($1,500.80), being the sum accrued on the said policy between June 28, 1948, and November 28, 1950;

8. The defendant Julie Peters, individually, recover of the defendant United States of America, the sum of Four thousand eight hundred and twenty-four Dollars ($4,824.00) payable in ninety successive monthly instalments on the 26th day of each month of her life commencing with the month of November, 1950, as computed according to the Refund Life Income Plan of settlement of said policy of National Service Life Insurance, such plan being sometimes referred to as "Option 4" as set forth in 38 C.F.R. § 8.75(c); § 8.79;

9. The defendant United States of America deduct ten per cent (10%) of the monthly instalments which have accrued upon the aforesaid policy from October 26, 1942, to November 28, 1950, and pay such sum to Messrs. Simpson, Thacher & Bartlett, attorneys for defendant Julie Peters, individually and as executrix, for professional services rendered in this cause, and deduct ten per cent (10%) of such sums as may hereafter be paid to said defendant Julie Peters on such policy, and pay the same to Messrs.

Simpson, Thacher & Bartlett for professional services rendered herein, all as provided in Section 817 of the National Service Life Insurance Act, (54 Stat. 1008, 1014, c. 757, Title VI, Part I, § 601, 617; 38 U.S.C., § 801, 817) as amended;

10. The sum of One Hundred forty-two and 62/100 Dollars ($142.62), costs in this action is hereby awarded against the plaintiff and that the defendant Julie Peters, individually and as executrix under the last will and testament of John J. Peters, deceased, have judgment and execution therefor.

Judgment signed this 1st day of December, 1950.

(sgd) JOHN W. CLANCY
U.S.D.J.

Judgment entered
WILLIAM V. CONNELL
Clerk

Dec. 6, 1950.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Affidavit

Civ. 26-397

WILLIAM BAUMET, *Plaintiff*,

– against –

UNITED STATES OF AMERICA, JULIE PETERS, individually and as executrix of the last will and testament of John J. Peters, Deceased, and Harriet, Joan, Lionel and Dwight Baumet, Infants, by Catherine Baumet, their Guardian ad Litem, *Defendants*.

STATE OF NEW YORK
COUNTY OF NEW YORK } ss:

JULIE PETERS, being duly sworn, deposes and says:

I am a defendant and cross-claimant, both individually and as executrix of the last will and testament of John J. Peters, deceased, in the above entitled action. I have been informed of the decision rendered herein in my favor both individually and as executrix.

It is my wish that all accrued proceeds of the policy of National Service Life Insurance at issue herein, whether due me in my individual or in my

represenative capacity, be computed and paid according to the terms of the Refund Life Income Plan, presently known as "Option 4", and that all future proceeds due to me under said policy be paid to me under the same Plan of Settlement. I have instructed my attorneys to use the aforesaid Plan of Settlement as a basis of computation of the sums to be recovered by me as set forth in the judgment to be entered herein.

Sworn to before me this 20th day
of November, 1950.
Notary Public

COPY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 270—October Term, 1950.

(Argued June 12, 1951 Decided July 23, 1951)

Docket No. 22009

WILLIAM BAUMET, *Plaintiff-Appellant,*

v.

UNITED STATES OF AMERICA, *Defendant-Appellee,*

and

JULIE PETERS, individually and as executrix under the Last Will and Testament of John J. Peters, Deceased, *Defendant-Appellee,*

and

HARRIET, JOAN, LIONEL and DWIGHT BAUMET, infants, by Catherine Baumet, their Guardian ad Litem, *Defendants-Appellants.*

Before:

SWAN, *Chief Judge,* and AUGUSTUS N. HAND and L. HAND, *Circuit Judges.*

Appeal from the United States District Court for the Southern District of New York

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Action by William Baumet to recover the proceeds of a National Service Life Insurance policy, wherein other claimants intervened and filed cross-claims. From a judgment dismissing the complaint of the plaintiff and the cross-claim of infant intervenors, and awarding recovery to the cross-claimant Julie Peters, as executrix of the designated beneficiary, and individually, the plaintiff and infant cross-claimants appeal. Judgment affirmed.

BARNET L. ARLAN, Attorney for appellants.

SIMPSON, THACHER & BARTLETT, Attorneys for appellee; Thomas Thacher and Robert W. Sweet, of counsel.

SWAN, *Chief Judge*:

This is an action brought against the United States pursuant to the National Service Life Insurance Act of 1940, as amended, 38 U.S.C.A. Sec. 817, to recover the proceeds of a $10,000 policy issued to William Baumet, Jr., who died in military service in October 1942. The plaintiff is the insured serviceman's father. Cross-claims were filed by several intervenors, and the United States admitted its liability and its readiness to pay such person as the court should adjudge entitled. The first cross-claimant was John J. Peters, a maternal uncle of the insured and the

"designated" beneficiary of the policy. In 1948 and before the case came to trial, Peters died. His widow, Julie Peters, then intervened, claiming as his executrix the instalments which matured before his death.[1] She also claimed in her individual right as a person standing *in loco parentis* to the insured,[2] instalments maturing after her husband's death. Four infant intervenors, half-brothers and half-sisters of the serviceman, by their guardian *ad litem*, filed a cross-claim alleging that they came next in line after their father, the plaintiff, on the statutory ladder of dispositive precedence.[3] The case as tried to the court without a jury. Judgment was rendered dismissing the plaintiff's complaint and the infants' cross-claim, and awarding recovery to Julie Peters as executrix and individually. The losing parties have appealed.

With respect to the infants' appeal no discussion is required. Their brief concedes that their claim is contingent, being predicated only on their right to take future instalments in the event of the death of the prior beneficiary. Upon the plaintiff's appeal the primary issue is the correctness of the court's finding that John and Julie Peters stood in *loco parenti* to the insured for a period

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[1] See *Baumet* v. *United States*, 2 Cir., 177 F. 2nd 806, cert. den. 339 U.S. 923.

[2] 38 U.S.C.A. Sec. 801 (f) as amended.

[3] 38 U.S.C.A. Sec. 802 (h) (3) (D).

of not less than one year prior to his enlistment in June 1941.[4] The court made very detailed findings of fact with respect to the insured's life from his birth on April 5, 1920, to his death in October 1942. Only a brief summary need be here recited. When he was five years old his parents separated and thereafter he lived with his mother until her death in 1936. He then lived for a year or so at the home of his father, who had remarried. In September 1937 he entered the University of Wisconsin. In his sophomore year he ran away from college, without notifying his father, and went to Florida. There, penniless, he was picked up by

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[4] The pertinent sections of the statute are the following sections of Title 38, as amended:

Section 801 (f) defines the terms "parent", "father" and "mother" to include "persons who have stood in loco parentis to a member of the military or naval forces at any time prior to entry into active service for a period of not less than one year"

Section 802 (g) provides: "The insurance shall be payable only to a widow, widower, child * * * parent, brother or sister of the insured." It gives the insured the right to designate the beneficiary of the insurance, "but only within the classes herein provided."

Section 802 (h) (3) provides to whom shall be paid instalments remaining unpaid at the death of any beneficiary: "(C) if no widow, widower, or child, to the parent or parents of the insured who last bore that relationship, if living, in equal shares;"

Section 802 (i) deals with payment of benefits if no beneficiary is designated by the insured. This section is applicable to instalments maturing after the death of John J. Peters.

the police who, at his request, notified his uncle John J. Peters, who supplied money for his return to the home of John and Julie Peters. This was in November 1938. Continuously thereafter their home was regarded as his both by him and by them. After 1938 his father never saw him, manifested no interest in his career and contributed nothing toward his support. The son charged the father with misappropriating trust funds left to the boy by his mother, of which the father had possession as his guardian, and this led to litigation in the Surrogate's Court and to a permanent estrangement between them. In 1939 the boy reentered the University of Wisconsin; he came back to his uncle's house with a broken wrist in January 1940 but again returned to Wisconsin in the summer of 1940 and went back to college in September. From 1938 on he had his own room in the home of his uncle and aunt in which he kept his personal belongings.

Whether or not the evidence is sufficient to show that the plaintiff "abandoned" his son, as Judge Clancy found, it is clear that by the end of 1938 the son had decided to be done with his father. He was then 18 years old and his choice of whom to live with would ordinarily be accepted by a court, at least if he elected to live with a kindly-disposed uncle and aunt rather than a hostile father. The appellant argues that regardless of the showing of affection and generosity on the part of the boy's

foster parents, the evidence is insufficient to establish that they assumed responsibility for his support—which we have held to be necessary to prove the existence of the *in loco parentis* relationship.[5] Judge Clancy found expressly that they did. We cannot say that this finding is "clearly erroneous"; hence it must stand. Indeed, we agree with it. When at the end of 1938 or early in 1939 the uncle, as the substituted guardian, took over control of the trust fund, it amounted to only $341. The boy's tuition at the University for the 1939 Fall term was paid out of this trust fund. How much, if anything, was left does not appear. He attended the University from September 1940 to June 1941, and the only source of funds for his education and support, other than the trust fund, if any, and small sums earned at two jobs during the summer of 1940, was what John and Julie Peters sent him. Mrs. Peters, although her memory was naturally vague as to amounts, testified that they did send him money out of their own funds. We cannot doubt that during the year just prior to the insured's enlistment in June 1941, they stood "in loco parentis" to him, even if that phrase be construed strictly in accordance with the common law doctrine with respect to support.

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[5] *Strauss* v. *United States*, 160 F. 2d 1017, 1019, cert. den. sub nom., *Goldbaum* v. *United States*, 331 U.S. 850, following the Sixth Circuit in *Niewiadomski* v. *United States*, 150 F. 2d 683, cert. den. 331 U.S. 850.

It is true that he became of age on April 5, 1941, but the *in loco parentis* relationship begun during minority is not lost when the minor attains majority.[6] Since John Peters stood *in loco parentis* to the insured and was the "designated" beneficiary his claim is superior to that of the natural father with respect to the instalments which matured before his death, and they were correctly awarded to the executrix of John Peters.

With respect to instalments maturing after the designated beneficiary's death, since no contingent beneficiary was designated, the appellant contends that he is entitled to share them equally with Julie Peters even if the finding that she was *in loco parentis* is allowed to stand. Section 802 (i) provides that "If no beneficiary is designated by the insured * * * the beneficiary shall be determined in accordance with the order specified in subsection (h) (3) of this section." Subsection (h) (3) (C), before its amendment in 1946, read as follows:

> "(C) if no widow, widower, or child, to the parent or parents of the insured, if living, in equal shares;"

Under this provision it may well be that the natural father would be entitled to share with the

[6] *Bland* v. *United States*, 5 Cir., 185 F. 2d 395. Cf. *Zazove* v. *United States*, 7 Cir., 156 F. 2d 24, holding the relationship may exist even if begun after minority.

foster mother of the insured. But the amendment introduced the limiting clause "who last bore that relationship".[7] The insured can have but one maternal parent and one paternal parent.[8] Since Section 801 (f) recognizes a person *in loco parentis* as a parent, the parents of William Baumet, Jr., at the time of his enlistment were Julie Peters, his foster mother, and John Peters, his foster father. Hence John Peters was the paternal parent who last bore that relationship to the insured, and the appellant cannot satisfy the statutory requirement. If *Henning* v. *United States*, D. Mass., 93 F. Supp. 380, holds the contrary we respectfully disagree with it. The award of future instalments to Julie Peters was correct.

Judgment affirmed.

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[7] Sec. 802 (h) (3): "(C) if no widow, widower, or child, to the parent or parents of the insured who last bore that relationship, if living, in equal shares;"

[8] V. A. Reg. No. 10, paragraph 7, 38 U.S.C.A. (1950 Supp.) p. 244.

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